RECENT CASES.

CHAMPERTY. — CONTINGENT FEES. — A, a domestic servant, having no means but his earnings, employed B, an attorney, to recover A's share in his father's estate. By the terms of their agreement, A was to defray the necessary expenses of the suit, and B was to charge nothing for his services except in event of success, in which case B should be entitled "to very large and liberal fees, in no event to exceed fifty per cent. of the amount collected" by B. The suit prosecuted for A was first decided against him; but was successfully appealed. *Held* — The agreement was lawful. It lacked the essential element of champerty, *sharing* in the fruits of the litigation; it left the defendant A still personally liable for B's fee. *Blaisdell* v. *Ahern*, 11 N. E. Rep. 681 (Mass). For a discussion of the ethics of contingent fees, and a collection of cases on this subject, see *Sharswood's Legal Ethics* (5th ed.), pp. 153 *et seq.*

CONSPIRACY, CRIMINAL — BOYCOTT. — A branch of the National Stonecutters' Union agreed to do no work for any shop or works disapproved of and known as "scab" by that organization, and to boycott and publish as "scabs" in the "Granite Cutters' Journal" any workmen who continued after warning to work in such shops. The results of such publication as a "scab" would be that no member of the Union would work with such a party, and work would be difficult for him to obtain. In pursuance of this agreement, by threats of publication as "scabs" the defendants actually induced certain workmen to leave the employ of the Ryegate Granite Co.

Held — To be settled by authority and on sound principle that the defendants were guilty of a criminal conspiracy at common law. The case collects many authorities. *State* v. *Stewart*, 9 Atl. Rep. 559 (Vt.).

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — POWER TO BRIDGE NAVIGABLE WATERS. — The case presents the important constitutional question whether Congress can lawfully confer upon a private corporation the capacity to occupy navigable waters within a State, and appropriate the soil under them for the purpose of interstate commerce, without the consent and notwithstanding the protest of the State. It was decided that the power to build bridges, or authorize them to be built, is incidental to the general power to regulate interstate commerce. *Decker* v. *B. & N. Y. R. R. Co.*, 30 Fed. Rep. 723. The same question is similarly decided in *Stockton* v. *B. & N. Y. R. R. Co.*, 10 N. J. L. J. 273. Mr. Justice Bradley gives a vigorous opinion. "In matters of foreign and interstate commerce," says he, "there are no States." *Vide* "The Arthur Kill Bridge Case," 10 N. J. L. J. 261.

CONTRACT — COMPROMISE OF A DISPUTED CLAIM. — "The compromise of a disputed claim made *bona fide* is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded. The detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise." — *Grandin* v. *Grandin*, 9 Atl. Rep. 756 (N. J.).

However difficult to support on theory, the result would seem to be a very desirable one. If the claim must "be doubtful in law or fact," no compromise can be relied on as final till the case has been tried to see whether it is doubtful. The difficulty is in regard to the consideration. The only "alteration in position" which will always be present is the giving up of a right to litigate, and there may be a difference of opinion as to whether one has a "right" to litigate an unfounded claim. In this connection it is noteworthy that *Callisher* v. *Bischoffsheim*, *Ockford* v. *Barelli*, and *Cook* v. *Wright*, which had been questioned in England, were expressly approved in *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266. And the editor's note cites half a dozen recent American cases to the same effect as to the sufficiency of the consideration.

CONTRACT — CONDITIONS — MEASURE OF DAMAGES. — A contracted in writing with B to make and deliver at a certain price per ton 6,000 tons of steel rails, to be drilled as directed by B. B did not give the directions when applied to, and notified A that B would not take the rails at all. The market value of rails fell. A used up the material bought for the contract with B, in rails sold to other

parties. *Held*—A was entitled as damages to the profits he would have made had B not prevented the performance of the contract, less the profit actually made by the sales to other parties. A was not bound to make the rails as per contract with B, sell them in open market, and charge B with the difference between the amount realized and that contracted for. *Hinckley* v. *Pittsburgh Bessemer Steel Co., Limited*, 7 Sup. Ct. Rptr. 875.

CONTRACT — CONSIDERATION. — A agreed with B to do certain blasting and excavating of rock at a stipulated price, but finding that the rock was not as soft as represented by B, he threatened to abandon the contract on the ground of misrepresentation. B, in order to induce him to continue, promised to pay an additional compensation. A then completed the work. It was held that A was entitled to recover the additional consideration. When A completed the work he was doing that which, on account of B's misrepresentation, he was not bound to do. Hence there was a consideration for B's promise to pay the additional sum. *Parker* v. *Glover*, 9 Atl. Rep. 217 (N.J.).

CONTRACT — FAILURE OF PLAINTIFF TO PERFORM FULLY — LIABILITY OF DEFENDANT IN IMPLIED CONTRACT. — A contracted with B to build a church. When the building was completed it was found not to comply exactly with the specifications. But B occupied the building. B objected to the deviations as soon as they were discovered. A sues B on a count for work and materials furnished. To alter the church so as to comply with the contract would cost much more than the alteration would be worth. *Held* — That the plaintiff was entitled to recover the contract price less the diminution in value of the building by reason of the deviations. The decision goes on natural equity and recent authorities. *Pinches* v. *Swedish Evangelical Lutheran Church*, 10 Atl. Rep. 264.

CONTRACT — MISTAKE — FAILURE OF CONSIDERATION. — Under a contract for the sale of land, a deposit was made with a condition for forfeiture on failure to complete the contract. The vendee accepted the title, but was unable to obtain the remainder of the purchase-money at the time agreed on. The vendor, in accordance with the conditions, forfeited the deposit, and afterwards re-sold the property. Three years later, the first vendee heard that the title was found bad on this re-sale. He accordingly brought an action to recover the deposit on the ground of mutual mistake and total failure of consideration. The Court held that this would be taking advantage of his own wrong. *Soper* v. *Arnold*, 35 Ch. D. 384.

CONTRACT — RESCISSION — MUTUAL MISTAKE. — A bought a cow of B for $80 both believing her to be barren. If she had been a breeder she would have been worth $750. The sale was complete, title had passed, and an order had been given for delivery. But before actual delivery B discovered that the cow was with calf, and refused to deliver because of the mistake. *Held*—That B could rescind the sale. "A barren cow is substantially a different creature than a breeding one. She is not in fact the animal, or kind of animal, the defendant intended to sell or the plaintiff to buy." *Sherwood* v. *Walker*, 33 N. W. Rep. 919 (Mich.).

CONTRACT — RIGHT OF A THIRD PARTY TO SUE. — A contracted with B to "drive" B's logs a certain distance down the river. By the terms of the contract B was to furnish A the money to pay off A's men. *Held*—A's men had no rights under the contract, as it was not made for their express benefit. *Wright* v. *Terry*, 2 So. Rep. 6 (Fla.). The case is valuable for the editor's note, which collects many late cases.

DEED — BUILDING RESTRICTION. — A stipulation in a deed providing that land shall be used for residence purposes only, will not be enforced after the plan of confining building in that neighborhood to residences has been abandoned, and adjoining land sold without restrictions. "A contract, the fulfilment of which becomes unreasonable, will not be enforced at the instance of a party who by his own conduct has produced such a result. After treating it as void he cannot appeal to a court of equity to treat it otherwise." *Duncan* v. *Central Passenger R.R. Co.*, 4 S.W. Rep. 228 (Ky.).

EVIDENCE — DYING DECLARATION. — The declarant, when so far gone that he could neither feel a pencil placed in his hand nor see a light held before his eyes, was asked if he thought he would ever get well. He answered, "I don't know; I don't think I will ever get well; the doctor don't tell me much."

Held — The question and answer would be sufficient to show that declarant had no hope of recovery; but considering the surrounding circumstances, and the

very low condition of the deceased, of which he was manifestly conscious, "we cannot doubt that the declarations were made under a belief of a speedily impending death." — *State* v. *Johnson*, 9 Cr. L. Mag. 451 (S.C.).

A note collects cases. See also *State* v. *Newhouse*, 2 So. Rep. 799 (La.), and note.

EVIDENCE — RAPE — FRESH COMPLAINT. — The assaulted party related the particulars to her mother on the morning after the alleged assault. *Held* — Not admissible. To be admissible such statements must be contemporaneous with and illustrative of the assault, and therefore *pars rei gestæ*. *McGee* v. *State*, 2 S. W. Rep. 890 (Tex). The rule has not been confined to facts which are part of the *res gesta*, but in cases of rape the fact that the injured party has conplained of the outrage at the first opportunity, may be shown as corroborating her testimony. What she said is also admissible. *Reg.* v. *Guttridges*, 9 Car. & P. 471; *Haynes* v. *Commonwealth*. 28 Grat. 942; *McCombs* v. *State*, 8 Oh. St. 643. See also *Dunn* v. *State*, 12 N. E. Rep. 826 (Ohio).

INTOXICATING LIQUORS — DAMNUM ABSQUE INJURIA. — "The local option legislation of this State being constitutional as a valid exercise of the police power, it follows that the incidental effects upon the value of property, such as a brewery and its fixtures, resulting from the inability of the owners to adjust their old business to the new law, is *damnum absque injuria*. The law does not take or damage their property for the use of the public, but only prevents them from taking or damaging the public for their use." (Syllabus.) *Menken* v. *City of Atlanta*, 2 S. E. Rep. 559 (Ga.).

LARCENY — WHAT CONSTITUTES? — The defendants were farm laborers, hired to pick cotton. They entered a cotton-house, carried cotton therefrom to the field, and placed it with cotton which they had picked the day before, but which had not been weighed. The intent was not to deprive the owner of the cotton, but to obtain from him compensation for picking cotton which they had not picked. *Held* — That such act has the secrecy, in fraudulent purpose, and the intent to deprive the owner of an interest in his property, elements which distinguish larceny from a civil trespass. The defendants had fraudulently taken and placed the property where they could assert a false lien on it. *Fort et als.* v. *State*, 2 So. Rep. 477 (Ala.).

LIBEL — PRIVILEGED COMMUNICATION — MERCANTILE AGENCY. — B, a mercantile agency, published a "Notification Sheet" giving information as to the business standing of traders, which they issued indiscriminately to subscribers. In it they stated that A had placed a chattel mortgage upon her property, which statement was false, and resulted in breaking up her business. *Held* — B was liable. The communication of the false information to those who had no interest in it was not privileged. Five of the fourteen judges dissented on the ground that communications made in good faith in the performance of what may reasonably be considered a duty to the public or an individual are privileged. "The old adjudications relied on to support the more narrow rule are the declarations of judges whose vision did not take in the widely different conditions which prevail in the affairs of men to-day." *King* v. *Patterson*, 36 Alb. L. J. 226 (N.J.).

LIBEL — PUBLICATION. — The libellous matter was contained in a sealed letter opened by the prosecuting witness. As he was unable to read, he gave the letter to his wife, who thereupon read the contents to him. *Held*—That, in the absence of any evidence whatever to show that the defendant knew of the prosecutor's inability to read, there was not a publication of the libel by the defendant. *State* v. *Syphrett*, 2 S. E. Rep. 624 (S. C.). (The count of the indictment which charged a publication to the prosecutor himself, failed because it was not charged that the defendant's act was done with the intent to cause a breach of the peace.)

LIFE INSURANCE POLICY — CHANGE OF BENEFICIARY — TRUST. — A took out a policy of insurance upon his own life, payable to his mother, who, together with A's sister, furnished the money for the first premium. Eight years later A surrendered the policy, which had been shown, but never delivered, to his mother. The policy was cancelled, and a new one in favor of A's wife was issued indorsed: "Original Pol. No. 9372 was issued May 25th, 1874, of which this is a continuation, and entitled to all its benefits." A's mother never knew of the change. A paid all the premiums after the first. *Held* — Upon A's death the entire amount of the policy was due to A's mother. The taking out the policy amounted to a settlement in trust upon the mother, and no power of revocation

was reserved. *Pingrey* v. *Natl. Life Ins. Co.*, 11 N. E. Rep. 562 (Mass.). The case collects the authorities upon this mooted question.

It would appear that there is difficulty in interpreting the taking out of an insurance policy into a declaration of trust. Furthermore, the only possible subject-matter of the trust would be the right of action on the policy. That right of action ceases when the payment of premiums on the policy cease. The premiums on the second policy were intended by both payer and receiver not to be on the original policy, but upon a substituted one. The decision of the Court in effect appropriates payments made for the benefit of one party to keep alive the rights of another. It is suggested that the rights of the parties are worked out more justly on the theory not of a declared, but of a constructive, trust. The contract of insurance is a unilateral one, the consideration of which is the payment of the first premium. The contract is subject to the condition subsequent, that unless the subsequent premiums are paid, the contract shall be of no effect. The effect of the contract is the immediate vesting in the beneficiary of a right to the insurance money on the death of the insured. This right is property, and is measured at any time by the "surrender value" of the policy. When the second policy is issued, the consideration paid for it is the surrender of the old one. The right of the new beneficiary is literally purchased with the right of the old beneficiary. This amounts to the same thing as if funds of the former beneficiary amounting to the surrender value of the first policy had been misappropriated and paid as a first premium on the second policy. On the principle of following trust property, the former beneficiary should be entitled to that proportion of the insurance money which the surrender value of the first policy bears to the amount of premiums paid under the second policy.

MASTER AND SERVANT — DISCHARGE WITHOUT NOTICE. — The appointment of a manager and receiver by a Court of Chancery operates as a discharge of servants, and those entitled to notice have an action for wrongful dismissal. A servant who is retained by the manager at the same wages does not continue under the old contract, and may be dismissed without notice. — *Reid* v. *Explosives Company*, 19 Q. B. D. 264.

In this case the service under the manager continued through the period for which he was entitled to notice; but certain *dicta* of the judges seem to overlook the fact that the plaintiff would be entitled to nominal damages for dismissal by the appointment of a manager notwithstanding he has lost nothing.

MORTGAGE — AFTER-ACQUIRED PROPERTY. — A mortgage purporting to cover "all moneys to which the mortgagor might during the continuance of the security become entitled under any will or other document," will be enforced in equity as to a share of a testator's residuary estate to which the mortgagor became entitled after the date of the mortgage, on the ground of specific performance of a contract. — *In re Clarke*, 35 Ch. D. 109.

MURDER — DEATH CAUSED BY NEGLECT. — Defendant was the husband of the deceased, who was weak, feeble, and unable to walk. Defendant left her exposed in the night-time to the cold and inclemency of the weather, though perfectly able to take care of her. From this exposure death ensued. *Held* — That this was murder under a statute providing that "murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." *Territory* v. *Manton*, 14 Pac. Rep. 637 (Mon. Ter.).

NEGLIGENCE — BURDEN OF PROOF. — Plaintiff's mare was run over by defendant's train. *Held*, That when he had proved the facts of the killing, the burden was shifted to the defendant to show that it was not through negligence. Alabama cases the only authorities cited. *South & North A. R. Co.* v. *Bees*, 2 So. Rep. 752 (Ala.). Compare *Early* v. *L. S. & M. S. R. Co.*, 66 Mich. 349.

NEGLIGENCE — PROXIMATE CAUSE. — By the negligence of railroad employees a cow is thrown from the track, and bouncing, injures the plaintiff. *Held*, The negligence is a proximate cause of the injury and company is liable. *Ala. G. S. R. Co.* v. *Chapman*, 36 Alb. L. J. 222 (Ala.)

NOTICE — QUITCLAIM DEED. — The holder of a quitclaim deed is not a purchaser without notice of adverse equities concerning which he could obtain information by reasonable diligence, in searching and inquiry. In nearly all cases of transfer of land in Kansas warranty deeds are used; only in cases of doubt are quitclaim deeds resorted to. *Johnson* v. *Williams*, 36 Alb. L. J. 238 (Kan.).

SALE — UNASCERTAINED GOODS. — The vendor sold 25,000 hedge plants to plaintiff and 57,000 to defendant, to be delivered at defendant's place of business. The 82,000 were so delivered, and, without making any selection, defendant disposed of all of them. Plaintiff sues for the conversion of 25,000. *Held* — The action lies. "Where the property sold is a part of an ascertained mass of uniform quality and value, separation is not essential, and the title to the part sold will pass to the vendee, if such appears to be the intention of the parties." *Kingman* v. *Holmquist*, 24 Rep. 332 (Kan.).

STATUTE OF FRAUDS — PAROL AGREEMENT FOR AN EASEMENT. — A verbal agreement for an easement of light is probably within the 4th section of the Statute of Frauds; but whether it is or not, it will be enforced in equity after part performance. — *McManus* v. *Cook*, 35 Ch. D. 681.

STATUTE OF FRAUDS — SALE OF CHATTEL — EXECUTORY CONTRACT. — A contracted to paint and frame a portrait of two children for B. B refused to receive the portrait when completed. *Held* — The contract was not one for a chattel, but one for work and labor. "The whole value was to arise out of the work of the artist on materials of no particular value." *Turner* v. *Mason*, 32 N. W. Rep. 846 (Mich.). The case is not in accord with the simpler English rule. *Lee* v. *Griffin*, 1 B. & S. 272.

TORT — WRONGFUL INTERFERENCE. — A was in the employ of B as general superintendent of B's brick business, under a contract of service for no definite period. C, general manager of a railroad, by refusing to furnish B a side-track to his brick-yard (which C had previously promised to do) unless A was discharged from B's services, procured A's discharge. *Held* — C was liable to A in damages. The case cites and comments upon a number of the few cases upon this interesting tort. *Chipley* v. *Atkinson*, 1 So. Rep. 934 (Fla.).

TRUST — IMPERFECT GIFT. — A father, desiring to make his daughter a present, bought $2,000 worth of bonds, but, at her request, kept them himself and remitted the interest to her. On his death, *held* — She cannot recover from the administrators. A gift is not complete without delivery of the *res*, and the Court will not make a valid trust out of an imperfect gift. *Flanders* v. *Blandy*, 24 Rep. 311 (Ohio).

TRUST — TRUSTEE OR DEBTOR. — A bank at A sent to the bank at B a bill for collection. The bill was paid, the money mingled with the other money of the B bank, and, pending remittance, credit was given on the books for the amount. The banks had no mutual account. The B bank then went into the hands of a receiver, who asks the Court if he is to pay the A bank in full or *pro rata* with other creditors. *Held* — He shall pay it in full. "No difficulty whatever arises from the confusion of these moneys, any more than in every other case where the rightful owner is in pursuit of trust-funds. In such case the owner need not point out the very goods, or bills, or coin. He does all the law requires if he shows that the goods, or bills, or coin came to the hands of the defendant impressed with a trust to his knowledge. In every such case the holder must respond either in the article taken or its value." *Thompson* v. *Gloucester City Savings Institution*, 24 Rep. 182 (N. J. Ch.). It seems difficult to support this decision on the principle of a trust. The Court admit that the trust-fund could not be followed after the confusion of the money. The assignee has the title to no specific thing into which the fund is known to have gone, and to which a trust can attach. Hence, one of the essential elements of a trust, viz., a *res* with reference to which the relation of trustee and *cestui que trust* can exist, is lacking, and the assignee took the property free from the trust. At the same time it does not follow that the creditors of the B bank are entitled to have property applied to the payment of their debts which was never intrusted to the credit of the bank, and property which, except for its peculiar nature, would have been held in the capacity of an agent simply. It is contrary to all equity that they should thus be enriched at the expense of others. This should have been the ground of the decision.

WITNESS — EXPERT — REFUSAL TO ANSWER. — A physician upon the stand as an ordinary witness refused to answer a question upon the ground that it was one involving expert evidence. *Held* — He must answer, though he was not called or paid as an expert. *State* v. *Teipner*, 36 Alb. J. 199 (Minn.).